IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| In the Matter of the Detention of: Dennis Breedlove. | ) | No. 53774-1-I |
| STATE OF WASHINGTON, Respondent, | ) | DIVISION ONE |
| v. | ) | UNPUBLISHED OPINION |
| DENNIS BREEDLOVE, Appellant. | ) | FILED: July 31, 2006 |

PER CURIAM -- While Dennis Breedlove was incarcerated for possession of depictions of minors engaged in sexually explicit conduct, the State filed a petition alleging he was a sexually violent predator. In a pretrial ruling, the trial court ruled that Breedlove's possession of child pornography constituted a recent overt act, so the State did not need to prove a recent overt act at trial. At trial, the court found that Breedlove was a sexually violent predator and committed him into the custody of DSHS. He appeals, arguing that due process required the State to prove at trial beyond a reasonable doubt that either (1) he committed a recent overt act, or (2) the possession of child pornography leading to his incarceration qualified as a recent overt

act.

In In re Detention of Marshall,[1] the Washington Supreme Court reiterated its holding in In re Detention of Henrickson[2] that when a petition is filed while the respondent is incarcerated for an act that itself constitutes a recent overt act, the State is not required to prove a recent overt act at trial. Marshall also approved this court's holding in State v. McNutt[3] that the trial court, not the jury, determines whether the individual is incarcerated for an act that qualifies as a recent overt act. Because the record shows that Breedlove's possession of child pornography constituted a recent overt act, the trial court did not err. We affirm.

FACTS

In 1988, Dennis Breedlove pleaded guilty to indecent liberties by forcible compulsion and served time in prison. In 1997, he pleaded guilty to second degree child molestation and possession of depictions of minors engaged in sexually explicit conduct (child pornography) and again served time in prison. On January 24, 2002, he again pleaded guilty to possession of child pornography and was sentenced to 12 months in prison. He was scheduled for release on August 6, 2002. On August 5, 2002, while Breedlove was still in total confinement, the State filed a petition seeking his commitment as a sexually violent predator under RCW 71.09.

At the probable cause hearing on the petition, the State relied on Breedlove's possession of child pornography as a recent overt act demonstrating his current

[1] 156 Wn.2d 150, 125 P.3d 111 (2005).
[2] 140 Wn.2d 686, 2 P.3d 473 (2000).
[3] 124 Wn. App. 344, 101 P.3d 422 (2004), review denied, 156 Wn.2d 1017 (2006).

dangerousness. The trial court concluded probable cause existed and ordered Breedlove detained pending trial, but it did not make a ruling on whether the State must prove the recent overt act at trial. In a pretrial hearing on October 18, 2002, the trial court heard further argument on the recent overt act issue and entered an order stating that

> [b]ased upon the argument of counsel and the evidence presented, the Court finds that, on the day the petition in this case was filed, the Respondent was incarcerated for an act that by itself would have qualified as a recent overt act under Detention of Henrickson v. State, 140 Wn.2d 686, 2 P.3d 473 (2000).

It ruled that the State did not need to prove at trial that Breedlove committed a recent overt act. Breedlove later waived his right to a jury trial.

On February 4, 2004, the trial court concluded Breedlove was a sexually violent predator and committed him to DSHS custody for placement in a total confinement facility for control, care, and treatment. Breedlove appeals the trial court's conclusions and orders on the recent overt act issue. This court stayed Breedlove's appeal pending the Washington Supreme Court's decision in Marshall.

## DISCUSSION

Under Washington's sexually violent predators act (Act),[4] the State may file a petition alleging a person is a "sexually violent predator" when that person "at any time previously has been convicted of a sexually violent offense [and] is about to be released from total confinement."[5] The Act mandates indefinite civil commitment for persons a court or jury determines beyond a reasonable doubt to be sexually violent

[4] RCW 71.09.010-.902.
[5] RCW 71.09.030(1).

predators.[6] A sexually violent predator is a person with a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."[7] The likelihood that a person will engage in predatory acts must be shown by a recent overt act if the person is not totally confined at the time the petition is filed.[8] A recent overt act is any act or threat that "either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act."[9]

Although the Act does not require proof of a recent overt act when the petition is filed against an incarcerated person, that person's commitment must still satisfy due process.[10] To satisfy due process, the commitment must be based on a finding of current dangerousness.[11] The Washington Supreme Court in In re Detention of Albrecht held that proof of a recent overt act

> necessarily satisfies the dangerousness element required by due process. This is because the recent overt act requirement directly and specifically speaks to a person's dangerousness and thus satisfies the dangerousness element required by due process.[12]

The court also specifically stated it was not overruling its previous holding in Henrickson.[13] There, the court held that if the petition was filed while the person was

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[6] RCW 71.09.060(1).
[7] RCW 71.09.020(16).
[8] RCW 71.09.060(1).
[9] RCW 71.09.020(10).
[10] Henrickson, 140 Wn.2d at 694 (citing In re Personal Restraint of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993)).
[11] In re Det. of Paschke, 121 Wn. App. 614, 622, 90 P.3d 74 (2004) (citing In re Det. of Albrecht, 147 Wn.2d 1, 7-8, 51 P.3d 73 (2002)), review granted, 156 Wn.2d 1030 (2006).
[12] 147 Wn.2d 1, 11, 51 P.3d 73 (2002).
[13] Id. at 11 n.11.

"incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent overt act, due process does not require the State to prove a further overt act occurred between arrest and release from incarceration."[14] In Marshall, the Supreme Court reiterated its holding in Henrickson and explicitly approved this court's holding in McNutt that whether a given act constitutes a recent overt act is a question for the court, not the jury.

I. Proof of Recent Overt Act

Before the Supreme Court decided Marshall, Breedlove argued that Henrickson and Albrecht, read together, stand for the rule that the State must prove a recent overt act at trial unless the respondent was, at the time of filing, serving the original sentence imposed upon conviction for a sexually violent offense. He argued that because he was incarcerated for a non-violent sexual offense at the time of the filing, the State must prove a recent overt act beyond a reasonable doubt at trial. But Marshall confirms Henrickson and resolves this issue adverse to Breedlove's position. We review interpretations of case law de novo.[15]

Henrickson provides two exceptions to the recent overt act requirement. The court held that "no proof of a recent overt act is constitutionally or statutorily required when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense, . . . *or an act that by itself would have qualified as a recent overt act*."[16] In Henrickson, both defendants in the consolidated case had histories of sexually violent

[14] 140 Wn.2d at 697.

[15] State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004) (citing State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995)).

[16] Henrickson, 140 Wn.2d at 689 (emphasis added).

crimes. The State filed the petitions while one was incarcerated for abducting a six year old girl and the other was incarcerated for unlawful imprisonment of a prostitute.[17] The court held that both defendants' convictions would qualify as sexually violent offenses or recent overt acts, so the State did not need to prove recent overt acts at trial.

In Albrecht, the State filed a sexually violent predator petition while the respondent was incarcerated for violating terms of his community placement.[18] Albrecht's incarceration was based only on a violation of the conditions of community placement, not the specific act leading to the violation.[19] The court held that despite Albrecht's incarceration at the time of filing, the State still needed to prove a recent overt act because

> [a]n individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous. Albrecht could have easily been jailed for consuming alcohol, going to a park, or moving without permission, each of which would have been a violation of the terms of his community placement but none of which would amount to a recent overt act as defined by the sexually violent predator statute.[20]

The court specified the narrow scope of its holding, stating that it applies "only to the limited situation where the State files a sexual predator petition on an offender (1) who has been released from confinement (2) but is incarcerated the day the petition is filed (3) on a charge that does not constitute a recent overt act. *Henrickson is not*

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[17] Id. at 689, 691.

[18] Albrecht had completed a prison sentence for a sexually violent offense. His community placement order prohibited, among other things, any contact with minor children. He violated this condition by offering two boys 50 cents to follow him. Albrecht, 147 Wn.2d at 4-5.

[19] The record in Albrecht did not indicate which other conditions of release were violated. Id. at 5.

[20] Id. at 11.

*implicated*."[21]

In Marshall, the defendant was incarcerated for third degree rape at the time the State filed its sexually violent predator petition.[22] The trial court determined Marshall was a sexually violent predator and granted the petition. Marshall argued due process required the State to prove a recent overt act. The Washington Supreme Court, citing its holding in Henrickson, reiterated that the State is not required to prove a recent overt act when, on the day the petition is filed, "'an individual is incarcerated for a sexually violent offense, . . . or for an act that would itself qualify as a recent overt act.'"[23]

The Marshall court distinguished Albrecht because Albrecht had been released into the community following total confinement and was then incarcerated again for violating his community placement conditions.[24] Albrecht is equally distinguishable here. The key to the Albrecht holding was that the act of violating community placement conditions did not, in itself, constitute a recent overt act.[25] Unlike Albrecht, Breedlove was charged with, convicted of, and incarcerated for the specific act that the State alleged, and the court found, constituted a recent overt act. Because the State filed the petition while Breedlove was incarcerated for the specific alleged recent overt act, Albrecht is not implicated and the trial court properly analyzed the issue under

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[21] Id. at 11, n.11 (emphasis added).
[22] 156 Wn.2d at 154.
[23] Id. at 157 (quoting Henrickson, 140 Wn.2d at 695).
[24] Id. at 159.
[25] The burden of proof at violation hearings is "preponderance of the evidence," rather than "beyond a reasonable doubt" as at criminal and sexually violent predator trials. See In re Det. of Davis, 109 Wn. App. 734, 745, 37 P.3d 325 (2002), review denied, 150 Wn.2d 1002 (2003).

Henrickson and Marshall.

II. Pretrial Determination of Recent Overt Act

Before Marshall was decided, Breedlove also argued the State must prove at trial beyond a reasonable doubt that the act leading to his incarceration meets the legal standard of a recent overt act. He maintained his due process rights were violated when the trial court made a pretrial determination that his possession of child pornography constituted a recent overt act, thus obviating the need to prove current dangerousness at trial. But Marshall also resolved this issue adverse to Breedlove's position when it approved this court's holding in McNutt.

In McNutt, the State filed a petition while he was incarcerated for communicating with a minor for immoral purposes.[26] This court held that Henrickson supports the conclusion that the trial court, not the jury, decides whether the respondent's act resulting in incarceration qualifies as a recent overt act.[27] We cited Henrickson as one example of a case in which the court reviewed an offender's history and the nature of the charges leading to incarceration to determine whether the offender's actions qualified as a recent overt act.[28] We held that whether a given act constitutes a recent overt act is a mixed question of law and fact, and is therefore properly left to the court, not the jury.[29] We stated that "[t]he factual inquiry determines the factual circumstances of McNutt's history and mental condition, and the legal inquiry determines whether an objective person knowing those factual circumstances would

[26] See RCW 71.09.020(15). McNutt had previously served a sentence for the sexually violent offense of indecent liberties.
[27] McNutt, 124 Wn. App. at 350.
[28] Id.
[29] Id.

have a reasonable apprehension of harm of a sexually violent nature resulting from the act in question."[30]

In Marshall, the Supreme Court stated that, where the individual is incarcerated when the petition is filed, "the question is whether the confinement is for a sexually violent act or an act that itself qualifies as a recent overt act."[31] It then approved McNutt's reasoning that this question was for the court: "We agree with the analysis in State v. McNutt that the inquiry whether an individual is incarcerated for an act that qualifies as a recent overt act is for the court, not a jury."[32] It held that trial courts must use McNutt's two step recent overt act analysis and affirmed our conclusion that Henrickson demonstrated this is a question for the court.[33]

If a dispute existed over whether Breedlove actually committed the alleged recent overt act, that would be a purely factual determination properly made at trial. But he was properly charged with, convicted of, and incarcerated for possession of child pornography. It is beyond a reasonable doubt that he committed the act that the State alleged constituted a recent overt act. The only decision left for Breedlove's commitment proceeding was whether this act, by itself, qualified as a "recent overt act" under the definition in the sexually violent predators act.[34] Marshall confirms this is a question properly left to the court, and the trial court did not violate Breedlove's due

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[30] Id.
[31] 156 Wn.2d at 158.
[32] 156 Wn.2d at 158 (internal citations omitted).
[33] Id.
[34] Regarding the burden of proof at trial, the trial court stated that
> obviously we're dealing here with a situation in which the defendant in fact has been found guilty of that particular act, and in this court's opinion, obviously the finding of guilt would be sufficient to withstand any attack as to whether the overt act did occur or not and it's merely a question of whether or not by law . . . it's within the definition of the statute.

process rights when it ruled on the issue.

III. Possession of Child Pornography

Breedlove argues that the evidence before the trial court did not establish that his possession of child pornography was a recent overt act. The State argues that the record, particularly Breedlove's offense history, clearly supports the trial court's conclusion that this constituted a recent overt act. The interpretation and application of a statute to an undisputed set of facts is a question of law we review de novo.[35]

Breedlove asserts that Albrecht involved an act, attempting to lure two boys to an apartment, that was part of an offense cycle and that the court still concluded that the act, by itself, would not qualify as a recent overt act. He argues that his possession of child pornography also was only part of an offense cycle and therefore did not rise to the level of a recent overt act. This is a misreading of Albrecht. There, the court did not consider the specific underlying act involved, but rather the violation of community placement conditions for which Albrecht was convicted and incarcerated. It was this general violation that the court concluded did not itself qualify as a recent overt act.[36] It made no ruling regarding whether the underlying act leading to the violation was a recent overt act. Here, Breedlove was charged with, convicted of, and incarcerated for the specific act of possessing child pornography.

The trial court declared that

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[35] Morales v. Westinghouse Hanford Co., 73 Wn. App. 367, 370, 869 P.2d 120, review denied, 124 Wn.2d 1019 (1994). Breedlove does dispute one finding of fact in which the trial court found that he was 20 years old when he masturbated and had anal sex with an eight year old boy. Substantial evidence does not support this finding, as the record indicates Breedlove was 13 or 14 when this encounter took place. Therefore, this finding of fact is stricken.

[36] Albrecht, 147 Wn.2d at 10-11.

> as a matter of law in this particular case the record is abundantly clear that under [the definition of a recent overt act] the conviction for the possession of child pornography for which Mr. Breedlove was incarcerated and eventually pled guilty does constitute an overt act, given his prior convictions, given the nature of his convictions, given the nature of this particular conviction, and that obviously anyone aware of those circumstances would be put into a reasonable apprehension of harm. . . .

The record supports the trial court's conclusion, as it indicates that Breedlove suffers from pedophilia. He has a history of improper sexual conduct involving minors, reflected in his two previous convictions for violent sexual offenses and other incidents detailed by Breedlove himself. He was 24 in 1987 when he forced an 11 year old girl to go with him behind a skating rink, where he forced her to the ground and had sexual intercourse with her until a car drove by and he fled the scene. He was released from prison in 1990. He committed his second violent sexual offense at age 33 in 1996, when he molested a 13 year old girl in her home. The police later arrested him at his home, where they found in his possession computer disks containing child pornography. Upon release from prison in 2000, he violated the terms of his community custody by using a computer to view child pornography and was returned to prison until June of 2001.

At the time of the State's petition, Breedlove was incarcerated for possession of child pornography based on his viewing child pornography on the computers at an employment office in Everett in September 2001. The images viewed by Breedlove included graphic depictions of sexual acts involving minors with adults and other minors. Some of the photos involved girls five to ten years of age being vaginally and anally penetrated by an adult penis.

In his deposition taken on October 25, 2002, Breedlove admitted that throughout his life he has committed several other sexual offenses involving minors for which he was never charged, including incidents where he was 24 and the victim was 8, and he was 20 and the victim was 12. Breedlove admitted that viewing child pornography was part of his offense cycle and one of his risk factors, and that it was something he felt he should not engage in. He stated that when released, as a voluntary security measure, he didn't want to be around any libraries or kids. He said that it would be unsafe for him to be unsupervised around children.

The latest act for which Breedlove was incarcerated demonstrates that he cannot control himself in public. Even in an employment office, on a public computer, with people around while he was supposed to be working on his resume, he could not prevent himself from indulging his sexual obsession with children. Knowing he would go to prison if caught was not a deterrent. He admits that viewing and possessing child pornography creates a risk for him, and his most recent violent sexual offense was committed during a time in which he also possessed child pornography. Based on this history, the trial court properly concluded that Breedlove's possession of child pornography would create a reasonable apprehension of violent sexual harm in the mind of an objective person who is aware of his history and mental condition. We affirm the trial court's conclusion that Breedlove's possession of child pornography constituted a recent overt act.

For the Court:

Ajid, J.

Grosse, J.

Baker, J.